

# Exhibit 9

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

\* \* \*

DUSTIN SWIGART and  
SONIA SCHULTZ, on behalf  
of themselves and all other  
similarly situated employees,  
and on behalf of the proposed  
Ohio Rule 23 Class,

Plaintiffs,

vs.

CASE NO. 1:11-cv-00033-SJD

FIFTH THIRD BANK,

Defendant.

\* \* \*

Deposition of MARK WILSON, 30(b)(6)  
Witness herein, called by the Plaintiffs for  
cross-examination pursuant to the Rules of Civil  
Procedure, taken before me, Karen M. Rudd, a  
Notary Public in and for the State of Ohio, at the  
offices of Jackson Lewis, 201 East Fifth Street,  
Suite 2600, Cincinnati, Ohio, on Wednesday,  
October 12, 2011, at 9:01 a.m.

\* \* \*

1 partner.

09:04:36

2 Q. And what are your job duties as a  
3 human resources business partner?

09:04:36

09:04:42

4 A. Really working with the line of  
5 business to drive the people-related strategies  
6 that align to the business strategies.

09:04:42

09:04:44

09:04:48

7 Q. What line of business?

09:04:50

8 A. Currently it's with retail line of  
9 business, which has responsibility for all of  
10 Fifth Third's branches.

09:04:50

09:04:57

09:04:57

11 Q. Does that include the mortgage  
12 line of business?

09:04:57

09:04:58

13 A. No.

09:04:59

14 Q. Was that previously the line of  
15 business that you were responsible for?

09:04:59

09:05:03

16 A. Yes.

09:05:04

17 Q. When did that change?

09:05:05

18 A. April of this year, 2011.

09:05:07

19 Q. Who took over that responsibility?

09:05:10

20 A. Her name is Lisa Brown.

09:05:13

21 Q. When you -- when did you start  
22 with Fifth Third Bank?

09:05:17

09:05:24

23 A. October 31, 2005.

09:05:25

24 Q. And when you started on

09:05:28

25 October 31, 2005, were you a human -- was your

09:05:33

1 job title human resources business partner?

09:05:37

2 A. That's correct. Yes.

09:05:38

3 Q. And did you have at that time

09:05:39

4 responsibility for the mortgage line of

09:05:41

5 business?

09:05:44

6 A. Yes.

09:05:44

7 Q. And am I referring to that

09:05:45

8 correctly, mortgage line of business, or would

09:05:46

9 you refer to it differently?

09:05:49

10 A. Line of business is correct, yes.

09:05:50

11 Q. Mortgage line of business. Okay.

09:05:52

12 And does the mortgage line of business include

09:05:55

13 retail, wholesale, and direct lending?

09:05:58

14 A. Yes.

09:06:03

15 Q. All three are under -- were

09:06:03

16 under -- you had responsibility for all three?

09:06:06

17 A. Yes, except for retail. The way

09:06:08

18 that we are structured is that retail rolls

09:06:11

19 into the affiliate structure. So the direct

09:06:13

20 lines of business that I had would be the

09:06:15

21 mortgage line of business, wholesale, and

09:06:17

22 direct.

09:06:20

23 Q. So retail -- when you say

09:06:22

24 affiliates, do you mean bank branches?

09:06:26

25 A. The way our affiliate structure

09:06:29

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1	Q. When did Mr. Lewis replace	09:10:16
2	Mr. Greenlee?	09:10:21
3	A. I'm not sure exactly when	09:10:21
4	Mr. Greenlee left, but Bob Lewis was made the	09:10:23
5	interim president of the mortgage company until	09:10:25
6	he was finally promoted to the role. I'm	09:10:28
7	thinking that was probably the latter portion	09:10:33
8	of 2006.	09:10:36
9	Q. Is Susan Makris still with the	09:10:37
10	company?	09:10:45
11	A. No.	09:10:45
12	Q. Do you know when she left the	09:10:45
13	company?	09:10:45
14	A. No.	09:10:46
15	Q. What about Stuart Greenlee?	09:10:46
16	A. No longer with the company.	09:10:53
17	Q. Any other differences between	09:10:55
18	October 2005 and the date on this document,	09:10:59
19	March 20, 2009?	09:11:05
20	A. Yes. One of the pieces that's	09:11:07
21	missing here is we had a retail channel	09:11:10
22	manager, and that responsibility -- person had	09:11:15
23	responsibility for really driving sales	09:11:17
24	products and programs for the retail MLO's and	09:11:19
25	the MLO's and the affiliates.	09:11:23

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1 retail now.

09:14:25

2 Q. And that was Lisa Brown that  
3 replaced you in April?

09:14:27

09:14:29

4 A. Yes.

09:14:30

5 Q. Okay. Well, that wasn't as hard  
6 as I thought it was going to be. Thank you. I  
7 think I'm done with that.

09:14:31

09:14:39

09:14:42

8 We talked about the chain of  
9 command that you are underneath. Let's talk  
10 about the chain of command for loan officers.  
11 You mentioned retail MLO's. And let me take  
12 one step back and just say when I refer to loan  
13 officers, I'm referring to Fifth Third's  
14 mortgage loan originators, okay?

09:14:57

09:14:58

09:15:01

09:15:09

09:15:14

09:15:17

09:15:19

15 A. Okay. Can we clarify that?

09:15:21

16 Q. Sure. What does -- why don't you  
17 explain to me the -- what the term mortgage  
18 loan originator means to you.

09:15:22

09:15:26

09:15:31

19 A. The way I would classify it, the  
20 mortgage loan originators that we have would be  
21 our retail channel and our direct channel.

09:15:34

09:15:38

09:15:40

22 Q. Okay. What is the difference  
23 between the two?

09:15:47

09:15:53

24 A. The retail channel LO's work  
25 within the affiliates and normally would be

09:15:53

09:16:03

1 assigned to the branch or financial center  
2 network.

3 Q. Okay.

4 A. The direct channel LO's are part  
5 of our inside mortgage sales group.

6 Q. Where do direct MLO's work or  
7 direct loan officers work?

8 A. The direct LO's that we have  
9 within the bank currently work in Cincinnati at  
10 our Madisonville location.

11 Q. You mentioned that the retail loan  
12 officers would be assigned to a bank branch or  
13 a financial center network. Can you explain  
14 that to me?

15 A. Sure. Either assigned to a branch  
16 or working as -- out of their home office. And  
17 really a lot of it depends on the overall  
18 financial plan for the affiliate. Each  
19 affiliate has an affiliate president, an  
20 affiliate mortgage exec, that's responsible for  
21 their profit and loss statement. So it's  
22 really upon them in terms of what staffing  
23 levels they would have in terms of number of  
24 LO's that would be assigned to a branch or the  
25 number of MLO's that would be working in the

09:16:03  
09:16:06  
09:16:09  
09:16:09  
09:16:11  
09:16:16  
09:16:33  
09:16:33  
09:16:33  
09:16:35  
09:16:38  
09:16:50  
09:16:53  
09:16:56  
09:16:56  
09:17:00  
09:17:04  
09:17:07  
09:17:09  
09:17:13  
09:17:15  
09:17:17  
09:17:19  
09:17:22  
09:17:24

1 market.

09:17:27

2 Q. Do the loan officers that are  
3 assigned to a bank actually have an office or a  
4 cubicle in the bank?

09:17:29

09:17:31

09:17:37

5 A. Sometimes they do.

09:17:39

6 Q. But when you say financial -- when  
7 you said financial center network, that didn't  
8 refer to a separate actual physical location  
9 other than a bank branch?

09:17:40

09:17:45

09:17:47

09:17:50

10 A. The way that Fifth Third calls its  
11 branches is often referred to as financial  
12 centers.

09:17:52

09:17:54

09:17:56

13 Q. There's not a Fifth Third mortgage  
14 building, though, that loan officers -- only  
15 loan officers would be working at, is there?

09:17:57

09:18:00

09:18:03

16 A. In some locations we call those  
17 loan production offices.

09:18:04

09:18:06

18 Q. Okay. Do you know which  
19 affiliates have loan production offices?

09:18:08

09:18:19

20 A. No.

09:18:19

21 Q. So the retail loan officers, who  
22 do they report to?

09:18:19

09:18:35

23 A. They would report to an area sales  
24 manager.

09:18:37

09:18:39

25 Q. I have seen the acronym ASM.

09:18:39



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1 Q. Okay. Who was the COO?

09:21:04

2 A. The COO in question, when you are  
3 looking at the org chart, this is the company  
4 mortgage COO. When I mentioned COO there,  
5 that's the COO for the bank.

09:21:07

09:21:10

09:21:13

09:21:16

6 Q. So there's -- is there some sort  
7 of reporting relationship that would combine  
8 these two charts essentially?

09:21:21

09:21:27

09:21:32

9 A. It's part of our unique culture  
10 with the affiliate model. If anything, you  
11 would probably see a dotted line between the  
12 affiliate mortgage exec to the mortgage company  
13 president, but it's very much, I would say, a  
14 weak dotted line, if any.

09:21:34

09:21:36

09:21:40

09:21:42

09:21:46

09:21:49

15 Q. What are the -- can you describe  
16 the job duties of the ASM 1 for me?

09:22:03

09:22:06

17 A. Sure. They have responsibilities  
18 for loan production, so anything that a retail  
19 MLO would have responsibility for, and they are  
20 also responsible for managing, coaching, their  
21 direct reports.

09:22:09

09:22:12

09:22:16

09:22:19

09:22:23

22 Q. On what?

09:22:24

23 A. Sales, sales process, coaching on  
24 improved sales results, development, some  
25 training. Our ASM's would also probably do

09:22:25

09:22:30

09:22:35

1 sales calls with the MLO's to do kind of 09:22:40  
2 just-in-time feedback around how a presentation 09:22:42  
3 went, et cetera. 09:22:45

4 Q. And what would the -- with respect 09:22:46  
5 to the ASM 1, are there -- is there a 09:22:52  
6 particular compensation plan for an ASM 1? 09:22:56

7 A. Yes. 09:23:00

8 Q. And are there goals related to 09:23:01  
9 loan -- their own loan volume and number of 09:23:05  
10 loans or some combination thereof? 09:23:09

11 A. Yes. 09:23:12

12 Q. And then do they also have goals 09:23:12  
13 for the LO's that are reporting to them? 09:23:15

14 A. Yes. 09:23:18

15 Q. What are the job duties of the ASM 09:23:19  
16 2, the non-producing sales manager? 09:23:24

17 A. Very similar to the ASM 1, but 09:23:26  
18 without the MLO component. So there's no 09:23:29  
19 personal production expectations for an ASM 2. 09:23:37

20 Q. And then the ASM 3? 09:23:37

21 A. The ASM 3, the same thing, no 09:23:38  
22 personal production expectations, but the 09:23:41  
23 nuance there is that they may also be managing 09:23:44  
24 other ASM's versus just LO's. 09:23:46

25 Q. Other than this case, are you 09:24:14

1	Judicial Notice. If you could turn to the last	09:31:54
2	page, page three. Is that your signature?	09:31:56
3	A. Yes, it is.	09:32:00
4	Q. And did you review this document	09:32:01
5	before you signed it?	09:32:04
6	A. Yes, I did.	09:32:05
7	Q. I have got a few questions about	09:32:06
8	this. Let's just march through some of the	09:32:12
9	paragraphs here. Paragraph two, you say you	09:32:16
10	became familiar with the job duties of the	09:32:21
11	bank's retail mortgage loan officers through	09:32:27
12	the course of your employment. How did you	09:32:27
13	become familiar with their job duties?	09:32:30
14	A. Very early on when I started, I	09:32:32
15	actually shadowed an MLO for half a day.	09:32:36
16	Q. Anything else?	09:32:43
17	A. I mean, through the course of my	09:32:43
18	responsibilities as HR business partner, to be	09:32:46
19	successful in that role, you have to know the	09:32:49
20	ins and outs of the business. So being	09:32:52
21	involved on various projects related to the	09:32:56
22	retail MLO population throughout the time that	09:32:57
23	I was supporting mortgage.	09:33:02
24	Q. You have never performed the job	09:33:03
25	duties of a loan officer, though, right?	09:33:06

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1 A. That's correct. 09:33:08

2 Q. And you have never managed or 09:33:08  
3 supervised their work, right? 09:33:10

4 A. That's correct. 09:33:11

5 Q. Have you ever -- aside from that 09:33:12  
6 day where you shadowed a mortgage loan officer, 09:33:16  
7 did you ever have conversations with a loan 09:33:21  
8 officer about their job duties? 09:33:28

9 A. I think maybe once or twice. 09:33:32

10 Q. Do you recall those circumstances? 09:33:35

11 A. No. 09:33:37

12 Q. What about conversations with 09:33:37  
13 them, and again I'm talking about prior to 09:33:44  
14 March 24, 2010, any conversations with them 09:33:47  
15 about the number of hours they were working? 09:33:51

16 A. No. 09:33:54

17 Q. I have seen reference in the 09:33:54  
18 documents that Fifth Third has produced in this 09:34:02  
19 case to different job codes for loan officers 09:34:06  
20 and varying -- slight variations in the job 09:34:11  
21 title, and I'm going to list them off. And if 09:34:16  
22 you could, when I'm finished, explain any 09:34:19  
23 differences, if there are any. 09:34:22

24 I have seen a reference to an 09:34:24  
25 emerging market loan officer, a unit loan 09:34:26

1 an outside loan officer?

09:39:19

2 A. It all depends on how we are  
3 defining the terms again. So I go back to I  
4 would clarify outside meaning a unit MLO could  
5 be generating all of his or her business from  
6 the outside, absolutely.

09:39:20

09:39:27

09:39:30

09:39:36

09:39:39

7 Q. So do outside MLO's only generate  
8 their business from outside the bank?

09:39:41

09:39:45

9 A. I would say the majority. The  
10 expectation is that the majority of the  
11 business should come from outside resources,  
12 but they also work closely with our branches.

09:39:49

09:39:51

09:39:53

09:39:55

13 Q. How many -- in October 2005, how  
14 many loan officers overall, and I want to  
15 exclude the wholesale, overall how many loan  
16 officers did Fifth Third employ?

09:39:58

09:40:04

09:40:07

09:40:13

17 A. I'd say roughly 1,100.

09:40:14

18 Q. Of those 1,100, what percent or  
19 what number would you assign to inside versus  
20 outside based on your best knowledge?

09:40:17

09:40:21

09:40:24

21 A. I'm not sure.

09:40:26

22 Q. I have also seen reference to  
23 banking center mortgage loan originator. Where  
24 would you classify that loan originator in  
25 this -- in terms of the inside versus outside

09:40:37

09:41:34

09:41:37

09:41:39

1 that are needed to put the loan through?

10:02:53

2 A. Yes.

10:02:54

3 Q. And is that something that both  
4 inside and outside loan officers would do?

10:02:55

10:03:02

5 A. Yes.

10:03:04

6 Q. And then there's a reference to  
7 cross-selling other financial services offered  
8 by the bank. Describe that for me.

10:03:04

10:03:13

10:03:13

9 A. Really the way that the cross-sell  
10 piece would look at would -- if I'm an LO  
11 sitting in a branch, and I have a closing  
12 coming up with a customer, the best way to do a  
13 cross-sell would be to invite the personal  
14 banker to that closing. So the MLO can make a  
15 warm handoff to the personal banker and  
16 hopefully the personal banker would be able to  
17 sell the customer additional products.

10:03:16

10:03:18

10:03:22

10:03:24

10:03:28

10:03:30

10:03:33

10:03:36

10:03:38

18 Say throughout the loan process,  
19 one of the things that the MLO's do is they  
20 talk about other products that we do sell, but  
21 really it's the personal bank or other people  
22 within the financial center that would actually  
23 sell those products.

10:03:40

10:03:42

10:03:44

10:03:48

10:03:50

10:03:53

24 Q. Do loan officers receive any type  
25 of pay if a borrower ends up using those or

10:03:54

10:03:57

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1 purchasing those products from Fifth Third? 10:04:03

2 A. Can you clarify the time period? 10:04:05

3 Q. '05 to 2010, March 2010? 10:04:06

4 A. We have a system called Team Fifth 10:04:12

5 Third, which is a referral system. It's open 10:04:15

6 to all employees. So if I know somebody, a 10:04:18

7 friend, that's looking for a credit card, and I 10:04:20

8 put it into Team 5/3 and refer it to a 10:04:23

9 financial center, I may get 10 or \$25 if the 10:04:26

10 account is opened. So that was in place during 10:04:29

11 that time period. 10:04:31

12 Q. It's no longer in place? 10:04:31

13 A. For MLO's, no. 10:04:33

14 Q. I have also seen reference to 10:04:34

15 something called a One Bank strategy. Are you 10:04:42

16 familiar with that phrase? 10:04:45

17 A. Yes. 10:04:46

18 Q. Can you describe what that means 10:04:46

19 to you? 10:04:48

20 A. Really, the crux of One Bank is 10:04:48

21 making sure the right hand and the left hand 10:04:52

22 know what each other is doing and really 10:04:55

23 presenting holistic solutions to the customer. 10:04:57

24 So instead of product pushing, it's really 10:05:00

25 around pushing the right financial solutions 10:05:02

1 business plan? 10:08:16

2 A. Yes. 10:08:16

3 MR. SELANDER: Mark that. 10:08:30

4 (Thereupon, Plaintiffs' Exhibit 5, 10:08:30

5 document entitled Fifth Third Bank One Bank 10:08:30

6 Addendum, was marked for purposes of 10:08:30

7 identification.) 10:08:59

8 BY MR. SELANDER: 10:08:59

9 Q. The court reporter has handed you 10:09:08

10 Exhibit 5, which should be Defendant's Bates 10:09:10

11 labeled 469 through 478. Do you have those 10:09:18

12 pages? 10:09:31

13 A. Yes. 10:09:31

14 Q. The first page of this document is 10:09:31

15 the title page, and it says Fifth Third Bank 10:09:31

16 One Bank Addendum. And I wanted to -- if you 10:09:33

17 could turn your attention to the second page. 10:09:37

18 There's a reference at the top there to the One 10:09:43

19 Bank program accompaniments to the Fifth Third 10:09:45

20 Mortgage Company's existing sales process. Do 10:09:49

21 you see that? 10:09:52

22 A. Yes. 10:09:53

23 Q. And it says that this 10:09:53

24 accompaniment is non-negotiable. What does 10:09:56

25 that mean? 10:09:59



1           A.    Non-negotiable is what I would           10:10:00  
2    call a cultural term that we use within Fifth       10:10:09  
3    Third saying, you know, this is something that     10:10:12  
4    really is not for discussion. This is our           10:10:14  
5    process and how we are going to go about it.       10:10:17

6           Q.    Below that it says that the One       10:10:22  
7    Bank strategy works to complement our existing     10:10:26  
8    mortgage sales process, and that it's           10:10:29  
9    interlaced with the following structure,           10:10:32  
10   prepare and prospect, lead generation and lead     10:10:36  
11   conversion, assess needs, recommend solutions,     10:10:39  
12   close the sale and implement solutions, follow     10:10:42  
13   through. That process described there, that's       10:10:46  
14   the mortgage sales process at Fifth Third,       10:10:51  
15   correct?   10:10:53

16          A.    No, this is the One Bank sales       10:10:53  
17   process.   10:10:55

18          Q.    So what is the existing sales       10:10:58  
19   process?   10:11:00

20          A.    The existing sales process that we     10:11:02  
21   have in place, really it would be similar, but     10:11:04  
22   as part of the One Bank team, this is the           10:11:10  
23   process, the prepare and prospect, assess           10:11:17  
24   needs, recommend solutions, close the sale and     10:11:17  
25   implement solutions, and follow through, the       10:11:17

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1 same sales process for all the lines of 10:11:19  
2 business that are part of One Bank. 10:11:21

3 Q. So that these steps occur in the 10:11:23  
4 mortgage sales process, correct? 10:11:26

5 A. Yes. 10:11:27

6 MR. HALL: Objection to the form 10:11:28  
7 of the question. 10:11:30

8 THE WITNESS: Yes. 10:11:32

9 BY MR. SELANDER: 10:11:32

10 Q. As we go through the document, 10:11:33  
11 would you agree that this is explaining how the 10:11:39  
12 One Bank program is integrated into the 10:11:43  
13 mortgage sales process? 10:11:48

14 A. Yes. 10:11:49

15 Q. So the preparation -- if you look 10:11:50  
16 on the second page, the same page we were just 10:12:24  
17 looking at, under prepare and prospect, there's 10:12:33  
18 a square bullet point there that says 10:12:35  
19 preparation for follow up with an existing 10:12:37  
20 customer includes review of financial needs 10:12:39  
21 assessment and financial summary, as well as 10:12:41  
22 current products and services on ACE. 10:12:44

23 Is that part of the process that 10:12:52  
24 we discussed earlier today where the loan 10:12:56  
25 officer is sitting down with the potential 10:13:00

1 Q. If you could look again at 10:29:08  
2 Exhibit 5, just on the first page there. In 10:29:10  
3 the upper right-hand corner, it says mortgage 10:29:13  
4 MLO playbook. What is the mortgage MLO 10:29:15  
5 playbook? 10:29:18

6 A. The playbook is something that we 10:29:19  
7 put together I think maybe early 2005 that 10:29:21  
8 talks about all the things that an MLO needs to 10:29:26  
9 do to be a successful originator at Fifth 10:29:29  
10 Third. 10:29:33

11 Q. And let's see here, this is an 10:29:33  
12 addendum, which suggests that it was added at a 10:29:38  
13 later date. On the bottom right -- bottom left 10:29:41  
14 corner it says April 21, 2009. Do you see 10:29:44  
15 that? 10:29:47

16 A. Yes, I do. And I'm a little 10:29:47  
17 concerned on that date. That doesn't look 10:29:50  
18 correct from my recollection. 10:29:51

19 Q. Based on what? 10:29:54

20 A. The One Bank sales process didn't 10:29:55  
21 start until probably -- the development of the 10:29:58  
22 sales process didn't probably start until the 10:30:01  
23 third quarter of 2009. We rolled out pilots 10:30:03  
24 beginning of 2010, and then all affiliates were 10:30:07  
25 on the One Bank sales process as of 10:30:10

1 Q. Okay. So the two there, there's 10:33:45  
2 really no difference between those two? 10:33:48

3 A. Between which two? 10:33:50

4 Q. The inside that might be working 10:33:52  
5 primarily in a bank branch and the outside that 10:33:55  
6 would apparently not have a bank branch, might 10:33:58  
7 be working out of the home office? 10:34:01

8 A. Yes. Duties and responsibilities 10:34:02  
9 would be the same, yes. 10:34:03

10 Q. But obviously the location might 10:34:04  
11 be different? 10:34:07

12 A. Yes. 10:34:07

13 Q. And then there was the emerging 10:34:07  
14 market loan officer who has the same job duties 10:34:13  
15 as the inside bank branch and outside mortgage 10:34:21  
16 loan originator, right? 10:34:26

17 A. Right. 10:34:27

18 Q. But they focus on a different area 10:34:27  
19 of or sector of the economy? 10:34:29

20 A. Yes. 10:34:31

21 Q. And then there is the unit 10:34:32  
22 mortgage loan originator who is compensated 10:34:35  
23 based on number of loans sold, but not volume? 10:34:39

24 A. Correct. 10:34:45

25 Q. And that unit mortgage loan 10:34:45

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1 really in that initial meeting and the contact 10:39:57  
2 that you have with them, and then after that -- 10:40:00  
3 in determining what their needs are, and then 10:40:03  
4 after that it's not really a sales process any 10:40:05  
5 longer. Is that what you are saying? 10:40:08

6 MR. HALL: Objection to the form 10:40:09  
7 of the question, mischaracterizes the witness's 10:40:10  
8 testimony. 10:40:12

9 THE WITNESS: From a mortgage 10:40:12  
10 perspective, that would be correct. 10:40:13

11 BY MR. SELANDER: 10:40:16

12 Q. Okay. But from the non-negotiable 10:40:16  
13 One Bank sales process, the sales process 10:40:18  
14 really continues all the way to closing, right? 10:40:21

15 A. Yes. 10:40:23

16 Q. Why is there a difference there? 10:40:23

17 A. A difference between? 10:40:28

18 Q. Between the sales process, One 10:40:29  
19 Bank, continuing all the way to closing, like 10:40:32  
20 this document suggests, and then a sales 10:40:34  
21 process for mortgage that ends after that 10:40:36  
22 initial meeting and the needs are determined. 10:40:41

23 A. When you say leads are determined, 10:40:44  
24 that's different than the sales process. The 10:40:46  
25 scenario that I walked through, the customer is 10:40:49

1 already at the table, so there's no lead 10:40:51  
2 generation needed from that, that perspective, 10:40:52  
3 in terms of getting leads to actually close 10:40:54  
4 those customers. 10:40:57

5 The reason why there's two 10:40:58  
6 separate processes is that, you know, one is 10:41:00  
7 mortgage specific. One would be -- potentially 10:41:01  
8 could go off in several different areas 10:41:04  
9 depending on the type of product and the type 10:41:06  
10 of referral that is being made. 10:41:08

11 So the sales portion, if I get a 10:41:09  
12 1003 and go through that process, that sales 10:41:13  
13 piece is complete upon close of the loan. But 10:41:16  
14 there's other sales processes that could 10:41:20  
15 continue on while the loan is in process. The 10:41:22  
16 loan could take anywhere from 30 to 60 days to 10:41:26  
17 get processed. 10:41:28

18 Q. Okay. So I just want to be clear. 10:41:29  
19 You said the sales process could continue -- 10:41:34  
20 the mortgage sales process could continue to 10:41:37  
21 closing; is that right? 10:41:39

22 A. It all depends. I mean, how would 10:41:40  
23 you define sales for this? 10:41:42

24 Q. How would you define sales? 10:41:45

25 A. I mean, for our purposes, once the 10:41:46

1 loan has closed is when the MLO would get 10:41:54  
2 compensation for it. So also MLO's would look 10:41:58  
3 at the application being a sale. So I made a 10:42:03  
4 sales call, I got an application, and if they 10:42:07  
5 are working through the process, that could 10:42:10  
6 also be perceived from an MLO's perspective as 10:42:11  
7 a sale. 10:42:14

8 So there's the aspect of close 10:42:16  
9 business, which I mentioned, and there's also 10:42:19  
10 the aspect that, you know what, I was able to 10:42:21  
11 turn a prospect into a customer. To me, that's 10:42:23  
12 a sale in itself, as well. 10:42:27

13 Q. We talked about how MLO's are 10:42:29  
14 paid, they are either draw plus commission or 10:43:11  
15 salary plus commission, prior to the 10:43:14  
16 reclassification. Do you agree that the amount 10:43:16  
17 of those commissions is based on the number and 10:43:21  
18 volume or some combination thereof of loans 10:43:24  
19 that they have sold to borrowers? 10:43:27

20 A. Yes. 10:43:29

21 Q. And loan officers can also receive 10:43:29  
22 an annual productivity bonus, correct? 10:43:34

23 A. Yes. 10:43:37

24 Q. Can you describe that? 10:43:37

25 A. The productivity bonus is based on 10:43:39

1 meeting certain thresholds that we set within 10:43:42  
2 the plan each year. If they meet the 10:43:44  
3 threshold, then they are eligible for an annual 10:43:47  
4 payout. 10:43:49

5 Q. Threshold of what? 10:43:49

6 A. The threshold, depending on the 10:43:50  
7 plan year, would vary from year to year. 10:43:53

8 Q. But what is the -- what literally 10:43:57  
9 is the threshold? Not the number, but is it -- 10:43:59  
10 what does the threshold represent? 10:44:02

11 A. The threshold represents either a 10:44:04  
12 productivity level in units or productivity 10:44:07  
13 level in volume. 10:44:09

14 Q. So number of units sold or the 10:44:10  
15 total value of those units sold? 10:44:13

16 A. Yes. 10:44:16

17 Q. Does Fifth Third, when it is 10:44:16  
18 looking to hire loan officers, look at their 10:44:27  
19 sales experience? 10:44:30

20 A. Yes. 10:44:31

21 Q. So that's one of the criteria that 10:44:32  
22 they would use in determining whether to hire a 10:44:35  
23 loan officer? 10:44:39

24 A. Yes. 10:44:40

25 Q. And loan officers have always had, 10:44:41



1 since you have been there, October 2005, let's 10:44:46  
2 put a time frame on it, October 2005 to 10:44:50  
3 December 31, 2010, have always had goals that 10:44:53  
4 they have to meet on a month by month basis, 10:45:01  
5 correct? 10:45:05

6 A. Yes. 10:45:05

7 Q. Okay. Can you describe what those 10:45:05  
8 goals are? 10:45:07

9 A. The goals would be a minimum 10:45:08  
10 expectation of units closed per month. 10:45:11

11 Q. Is there a volume, as well, or is 10:45:14  
12 it only units? 10:45:16

13 A. We have tended to focus on units. 10:45:16

14 Q. And if they fail to meet those 10:45:20  
15 goals, what happens? 10:45:22

16 A. Really, we look at all the factors 10:45:24  
17 in terms of why they didn't meet the set 10:45:31  
18 production level, but the manager would be 10:45:34  
19 responsible for counseling that employee on how 10:45:37  
20 to improve their sales performance. 10:45:39

21 Q. So there's -- are there sort of 10:45:41  
22 like steps of you didn't meet it this month, we 10:45:44  
23 are going to have a talk, two months in a row 10:45:50  
24 we have to have a written warning, something 10:45:52  
25 like that? 10:45:54

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1 A. Yes. 10:45:54

2 Q. Can you describe what that is? 10:45:54

3 A. Basically what we do is we look at 10:45:56  
4 the performance period. So if performance 10:46:05  
5 comes in under standards for a month, it's a 10:46:05  
6 conversation. If we see under-performance 10:46:06  
7 below the standard in a second month, it would 10:46:09  
8 typically go to a written warning of some sort. 10:46:12  
9 And then from that perspective, if we don't see 10:46:15  
10 improved performance within a certain time 10:46:19  
11 period, sometimes it can be immediate sustained 10:46:21  
12 improvement that we would be looking for, that 10:46:27  
13 would potentially be when we would move to 10:46:29  
14 termination. 10:46:31

15 Q. Are you aware of any loan officers 10:46:31  
16 that have been promoted to ASM because of their 10:46:41  
17 sales? 10:46:49

18 A. Yes. 10:46:49

19 Q. What's the benefit of moving from 10:46:49  
20 a loan officer position to an ASM 1 position, 10:46:55  
21 for example? 10:46:59

22 A. I think the benefit would be from 10:47:00  
23 a development standpoint. If a person wants to 10:47:01  
24 progress into management, that's a great path 10:47:03  
25 to go. In addition to the personal component 10:47:06

1 of production, they would also have 10:47:09  
2 compensation elements related to the team's 10:47:12  
3 production, as well. 10:47:15

4 Q. And there's also a threshold where 10:47:15  
5 loan officers can, if they have enough sales or 10:47:20  
6 volume or units, can be assigned a sales 10:47:23  
7 assistant, correct? 10:47:27

8 A. Yes. 10:47:28

9 Q. What is the -- what's the role of 10:47:29  
10 the sales assistant? 10:47:32

11 A. A sales assistant really would be 10:47:34  
12 somebody that can help the loan officer process 10:47:37  
13 the loans. In addition to processing loans, 10:47:39  
14 they can also help with marketing activities to 10:47:42  
15 build that loan officer's business. 10:47:45

16 Q. And Fifth Third also ranks and 10:47:46  
17 compares the loan officers based on their 10:47:53  
18 sales, correct? 10:47:55

19 A. Yes. 10:47:55

20 Q. And they do that within the 10:47:56  
21 affiliate, regionally, and then nationally, 10:47:59  
22 correct? 10:48:01

23 A. Yes. 10:48:01

24 Q. And if loan officers are, at least 10:48:02  
25 during -- prior to at least October 2005 to, 10:48:06

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1 let's say, December 2010, was there -- were 10:48:09  
2 there awards or prizes for being in a top 10:48:14  
3 percentage or a top number of loan officers? 10:48:21

4 A. Yes. 10:48:21

5 Q. Can you describe that? 10:48:21

6 A. One of the things we have is a 10:48:22  
7 President's Circle, which is an annual rewards 10:48:24  
8 trip or annual bonus based on being in those 10:48:27  
9 top percentages. 10:48:30

10 Q. What are the percentages? 10:48:31

11 A. It depends. It varies from role 10:48:33  
12 to role. 10:48:35

13 Q. By, I'm sorry? 10:48:36

14 A. It varies from role to role. 10:48:37

15 Q. Okay. So what would be the 10:48:39  
16 various roles? 10:48:40

17 A. Like for an MLO, it might be the 10:48:41  
18 top ten percent of our MLO's and based on 10:48:43  
19 production volume. We may have another 10:48:47  
20 category that would be top five percent based 10:48:50  
21 on actual number of units produced. 10:48:53

22 Q. When you say role, though, are you 10:48:56  
23 referring to an emerging markets versus an 10:48:59  
24 outside or an inside? 10:49:02

25 A. Typically we have categories for 10:49:03

1	loan officer, manager, affiliate mortgage	10:49:06
2	manager.	10:49:09
3	Q. I see. Those rankings are	10:49:10
4	published in an employee newsletter, correct?	10:49:21
5	A. No.	10:49:24
6	Q. No? Are any awards published in	10:49:25
7	the employee newsletter?	10:49:29
8	A. We don't have an employee	10:49:32
9	newsletter.	10:49:34
10	Q. Okay. I have seen reference to	10:49:34
11	Loan Street News. Are you familiar with that?	10:49:36
12	A. Loan Street Journal.	10:49:39
13	Q. Loan Street Journal. What is the	10:49:40
14	Loan Street Journal?	10:49:42
15	A. Loan Street Journal was a	10:49:42
16	publication that we had that we no longer	10:49:44
17	publish, but it was something that we published	10:49:48
18	weekly with just general information.	10:49:50
19	Q. Did it have information about the	10:49:52
20	rankings or of awards given to loan officers?	10:49:56
21	A. It would have once the awards were	10:50:00
22	handed out. It would also have links to where	10:50:03
23	the rankings were kept.	10:50:06
24	Q. Are you familiar with XINNIX sales	10:50:10
25	training?	10:50:22

1 A. Yes. 10:50:22

2 Q. What is that? 10:50:22

3 A. It's sales productivity training 10:50:22

4 that we have partnered with an external firm. 10:50:22

5 Q. What does it entail? What does 10:50:23

6 the training entail? 10:50:25

7 A. XINNIX is a firm that specializes 10:50:27

8 in the mortgage sales process. So we have left 10:50:30

9 it up to each affiliate to determine which of 10:50:33

10 their participants would go through the 10:50:35

11 training. We have gone through a couple 10:50:37

12 different iterations in terms of having all 10:50:41

13 employees going through the training and then 10:50:44

14 having select employees go through the 10:50:45

15 training. 10:50:49

16 Q. And how long has Fifth Third been 10:50:49

17 utilizing XINNIX sales training? 10:50:53

18 A. I believe since 2009. 10:50:55

19 Q. And are there documents associated 10:50:59

20 with the sales training? 10:51:05

21 A. Most of the training is web-based, 10:51:06

22 but there are some homework pieces that are 10:51:09

23 expected for the loan officers to complete in 10:51:11

24 between the trainings. 10:51:14

25 Q. When a loan officer is hired, is 10:51:15

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1           A.    A lot of times if an employee           10:53:27  
2   terminates, it's -- we have records retention       10:53:28  
3   guidelines, so the manager should check with       10:53:31  
4   the records retention guidelines on what they       10:53:34  
5   can basically get rid of and what they need to       10:53:36  
6   keep.   10:53:39

7           Q.    And you are not aware if that's       10:53:40  
8   part of their file?                                   10:53:43

9           A.    No.                                       10:53:44

10          Q.    Looking back at your declaration,       10:53:45  
11   Exhibit 3, paragraph seven discusses your           10:54:19  
12   initial review of the Fair Labor Standards Act       10:54:37  
13   and regulations related to the administrative       10:54:41  
14   exemption and loan officers. Do you agree with       10:54:45  
15   that?    10:54:48

16          A.    Yes.                                      10:54:48

17          Q.    You joined the company on               10:54:49  
18   Halloween 2005. Were you aware that you would       10:54:57  
19   be immediately looking into these issues --       10:55:02

20          A.    No.                                       10:55:04

21          Q.    -- at the time? No?                    10:55:04

22          A.    No.                                       10:55:05

23          Q.    Do you recall how soon after you       10:55:06  
24   started looking at the federal regulations?           10:55:08

25          A.    I'd say it was in probably one or       10:55:12

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1 two months.

10:55:16

2 Q. Were you instructed by someone to  
3 look at them?

10:55:18

10:55:24

4 A. No.

10:55:24

5 Q. Did you keep any notes from your  
6 review of them?

10:55:24

10:55:24

7 A. No.

10:55:27

8 Q. Do you have any e-mail  
9 correspondence related to your review of those  
10 regulations during that time frame?

10:55:27

10:55:29

10:55:31

11 A. During the time frame related to  
12 item number seven?

10:55:33

10:55:35

13 Q. Correct.

10:55:36

14 A. No.

10:55:37

15 Q. No? Did you draft any memos for  
16 other human resources employees or other  
17 executives related to your review?

10:55:37

10:55:44

10:55:49

18 A. No.

10:55:51

19 Q. You mentioned that -- you  
20 reference the -- excuse me. You referenced  
21 that you reviewed the CFR 541.203(b). Do you  
22 recall if you reviewed the preamble to the new  
23 regulations, the 2004 regulations?

10:55:51

10:55:59

10:56:02

10:56:08

10:56:14

24 A. No, I don't recall.

10:56:18

25 Q. When you began this review, did

10:56:19



1       you review any case law related to the       10:56:25  
2       classification of loan officers?       10:56:31

3               A.     No.       10:56:32

4               Q.     So at that point, you weren't       10:56:32  
5       aware of the Casas versus Conseco case?       10:56:35

6               A.     No.       10:56:39

7               Q.     Are you aware of that case now?       10:56:40

8               A.     No.       10:56:41

9               Q.     And when you read the 541.203(b)       10:56:56  
10       regulation, did you understand that that was an       10:57:02  
11       example provided by the Department of Labor?       10:57:05

12              A.     Yes.       10:57:07

13              Q.     Did you also understand that it       10:57:07  
14       was the Department of Labor's position that       10:57:13  
15       loan officers who have the primary duty of       10:57:15  
16       making sales were -- should be classified as       10:57:17  
17       non-exempt?       10:57:20

18              A.     Repeat the question again.       10:57:21

19              Q.     Sure. When you reviewed, and I'm       10:57:22  
20       talking about this initial review that you did,       10:57:25  
21       when you reviewed 29 CFR 541.203(b), did you       10:57:29  
22       understand it was the Department of Labor's       10:57:35  
23       position that loan officers who have the       10:57:36  
24       primary duty of making sales should be       10:57:39  
25       classified as non-exempt?       10:57:41

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1 A. No. 10:57:43

2 Q. You didn't have that 10:57:43

3 understanding. Had you -- prior to working for 10:57:47

4 Fifth Third, had you ever worked for a bank? 10:58:08

5 A. No. 10:58:10

6 Q. How did you -- you said you 10:58:10

7 shadowed a loan officer for half of a day. How 10:58:14

8 else did you familiarize yourself with the job 10:58:17

9 duties of a loan officer when you were 10:58:21

10 conducting this initial review? 10:58:25

11 A. Really it was working closely with 10:58:26

12 several of the line of business partners, so, 10:58:29

13 you know, attending meetings where we would 10:58:30

14 talk about strategy, also specific tactics, 10:58:32

15 everything in terms of putting together the 10:58:36

16 overall financial plan for the mortgage 10:58:38

17 company, and in terms of working with the 10:58:41

18 affiliates. So really it's just building those 10:58:43

19 relationships with the partners that I would 10:58:45

20 support as part of the mortgage company. 10:58:47

21 Q. Do you recall who any of those 10:58:50

22 people were? 10:58:52

23 A. Yes. 10:58:52

24 Q. Could you name them? 10:58:54

25 A. There were some on the 10:58:55

1 organizational chart that we referenced 10:58:58

2 earlier, many of those people. 10:59:01

3 Q. Why don't we take a look at that, 10:59:03

4 just so we can get -- so you are looking at 10:59:05

5 Exhibit 2, correct? 10:59:15

6 A. Yes. 10:59:17

7 Q. Who would you have consulted with 10:59:18

8 to learn about the job duties of loan officers 10:59:21

9 in this October -- early time frame in your 10:59:23

10 employment? 10:59:27

11 A. One would be Geoff Hill, Steve 10:59:27

12 Johnson. At the time, some of these people 10:59:38

13 were not there. Another one that would -- I 10:59:40

14 would probably have would be Joe Treinen. 10:59:45

15 Q. Could you spell his last name? 10:59:47

16 A. I believe it's T R E I N E N. 10:59:48

17 Q. Is he still with the company? 10:59:54

18 A. No. 10:59:55

19 Q. What was his position in October 10:59:56

20 of 2005? 10:59:59

21 A. He had responsibility for the 11:00:00

22 retail sales programs and products. So all the 11:00:02

23 affiliate MLO's. 11:00:07

24 Q. Anyone else that you can think of? 11:00:11

25 A. No. 11:00:16

1 Q. When you were conducting this 11:00:16  
2 initial review, did you review any of the prior 11:00:29  
3 Department of Labor opinion letters related to 11:00:34  
4 loan officers? 11:00:37

5 A. No. 11:00:37

6 Q. Were you aware of litigation that 11:00:38  
7 was occurring related to the exempt status of 11:00:49  
8 loan officers? 11:00:53

9 A. No. 11:00:53

10 Q. Now, paragraph eight, it says 11:00:54  
11 during mid 2006, the business, along with the 11:01:07  
12 assistance of the legal department, reviewed 11:01:10  
13 the MLO positions. I want to clarify that that 11:01:12  
14 date there, during mid 2006, is correct. 11:01:18

15 A. Yes. 11:01:21

16 Q. Is that accurate? Okay. When you 11:01:22  
17 say the business in this paragraph, what are 11:01:26  
18 you referring to? 11:01:31

19 A. The line of business. 11:01:31

20 Q. And who else other than you would 11:01:33  
21 have been reviewing the MLO positions? 11:01:38

22 A. Our compensation department and 11:01:42  
23 the legal department, as mentioned, and 11:01:46  
24 representatives from the line of business. 11:01:48

25 Q. Okay. So compensation, legal, and 11:01:50

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1 then the representatives from line of business.

11:01:57

2 Who from the compensation department?

11:01:59

3 A. Lauren Olson.

11:02:01

4 Q. Do you know if that's O L S O N or

11:02:07

5 E N?

11:02:10

6 A. O N.

11:02:10

7 Q. Anyone else from the compensation

11:02:11

8 department?

11:02:15

9 A. Sean Stapleton.

11:02:15

10 Q. Anybody else?

11:02:17

11 A. No.

11:02:21

12 Q. What about from legal?

11:02:22

13 A. At this time, it probably would

11:02:24

14 have been Keith Rummer.

11:02:27

15 Q. I'm sorry, Keith --

11:02:29

16 A. Rummer.

11:02:30

17 Q. R U M M E R?

11:02:32

18 A. Yes.

11:02:33

19 Q. Anyone else?

11:02:34

20 A. No.

11:02:35

21 Q. And then the other people from the

11:02:37

22 line of business, who are you referring to

11:02:45

23 there?

11:02:46

24 A. It would have been Joe Treinen, as

11:02:46

25 I mentioned earlier.

11:02:49

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1 Q. Anyone else?

11:02:50

2 A. Probably the mortgage president at  
3 the time, Mr. Rick Greenlee.

11:02:54

11:03:02

4 Q. Anyone else that you can think of?

11:03:04

5 A. No.

11:03:09

6 Q. And it says reviewed the mortgage  
7 loan -- the MLO positions. Which positions?  
8 It's plural. I'm wondering which positions you  
9 are referring to there.

11:03:09

11:03:14

11:03:24

11:03:26

10 A. It would be our retail MLO  
11 positions.

11:03:26

11:03:29

12 Q. And within that, what are you  
13 referring to?

11:03:30

11:03:32

14 A. The specific job codes that we had  
15 at the time for those that were the affiliate  
16 based positions.

11:03:32

11:03:36

11:03:40

17 Q. Do you recall what those were, not  
18 the specific job codes, but the title that went  
19 along with the job code?

11:03:41

11:03:46

11:03:49

20 A. A lot of them probably are our  
21 emerging markets MLO. I can't recall some of  
22 the other titles that we would have had for it.  
23 I'm not sure if the outside MLO was in place at  
24 that time, so --

11:03:50

11:03:57

11:04:04

11:04:07

11:04:09

25 Q. How did you review the position?

11:04:10

1 What did you do with this group to review the 11:04:20  
2 position? 11:04:23

3 A. Well, I think part of it was, you 11:04:24  
4 know, based on the new provisions related to 11:04:27  
5 the FLSA. One of the things our company does 11:04:31  
6 on a regular basis is periodically audit groups 11:04:34  
7 of positions just to make sure we are in 11:04:39  
8 compliance with the FLSA. 11:04:40

9 Q. So what went into this particular 11:04:43  
10 audit? 11:04:45

11 A. This particular audit just looked 11:04:46  
12 at the duties and responsibilities of the role 11:04:48  
13 and just making sure that those duties and 11:04:51  
14 responsibilities, you know, one, still applied 11:04:53  
15 and, two, assessing where they would fall as it 11:04:56  
16 relates to the FLSA guidelines. 11:05:00

17 Q. How did you determine -- how did 11:05:03  
18 you assess the job duties and responsibilities 11:05:08  
19 of the MLO's? 11:05:10

20 A. I think one of the things was as 11:05:13  
21 part of the team that I mentioned, Joe Treinen, 11:05:15  
22 for example, a former MLO, had worked his way 11:05:18  
23 up to manager and worked his way up into the 11:05:21  
24 bank core role. So within his day-to-day 11:05:23  
25 responsibilities, as well as his work 11:05:25

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1 experience, he is very familiar with the duties 11:05:26  
2 and responsibilities of an MLO, so he was a 11:05:28  
3 voice of the business through those 11:05:31  
4 conversations to validate these are the duties 11:05:56  
5 and responsibilities for the role. 11:05:56

6 Q. Was there any survey done of the 11:05:56  
7 MLO's? 11:05:56

8 A. No. 11:05:56

9 Q. Any interviews done with MLO's? 11:05:56

10 A. No. 11:05:56

11 Q. Were there any memos created 11:05:56  
12 memorializing the audit? 11:05:56

13 A. No. 11:05:58

14 Q. Any presentations, PowerPoints, or 11:05:58  
15 something to that effect, handouts at a meeting 11:06:02  
16 that you recall? 11:06:05

17 A. Probably some handouts. 11:06:06

18 Q. Do you still have those documents? 11:06:09

19 A. No. 11:06:11

20 Q. Was there e-mail correspondence 11:06:11  
21 relating to these meetings and the discussions 11:06:15  
22 you were having? 11:06:17

23 A. I think correspondence was limited 11:06:18  
24 to meeting times and appointments. 11:06:20

25 Q. Do you recall when the audit was 11:06:22



1	complete?	11:06:31
2	A. Not specifically.	11:06:32
3	Q. Generally?	11:06:33
4	A. I'd say in the mid to late 2006	11:06:37
5	time period.	11:06:39
6	Q. There's also -- in the second	11:06:40
7	sentence of that paragraph, it says the	11:07:00
8	business worked with in-house legal counsel and	11:07:03
9	senior management to evaluate the position,	11:07:05
10	parentheses, S. Is that a differentiation that	11:07:07
11	you were making whether it was multiple	11:07:15
12	positions or one position?	11:07:16
13	A. Multiple positions.	11:07:18
14	Q. It says Fifth Third's needs -- it	11:07:20
15	continues and says the new FLSA regulations and	11:07:27
16	Fifth Third's needs with respect to financial	11:07:27
17	services employees. What were Fifth Third's	11:07:30
18	needs at the time? What are you referring to	11:07:32
19	as Fifth Third's needs?	11:07:35
20	A. The expectations around duties and	11:07:36
21	responsibilities for our MLO's.	11:07:40
22	Q. And do you recall what those	11:07:41
23	expectations were?	11:07:44
24	A. Very similar to what we have	11:07:45
25	discussed previously in terms of production.	11:07:48

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1 Q. So was it sales, actually numbers, 11:07:50  
2 that you are talking about? 11:07:55

3 A. It was numbers, but also some of 11:07:56  
4 the cross-sell pieces, as well. 11:08:00

5 Q. What would the -- what would the 11:08:03  
6 numbers have to do with whether or not someone 11:08:20  
7 was administratively exempt as far as -- we are 11:08:22  
8 talking about volume and units. What does that 11:08:26  
9 have to do with the administrative exemption 11:08:29  
10 analysis that you were undertaking or going 11:08:32  
11 under? 11:08:34

12 MR. HALL: Objection to the form 11:08:35  
13 of the question. 11:08:36

14 THE WITNESS: So let me make sure 11:08:37  
15 I understand how you are looking at Fifth 11:08:39  
16 Third's needs. How are you defining that? 11:08:42

17 BY MR. SELANDER: 11:08:44

18 Q. Well, I asked you what Fifth 11:08:44  
19 Third's needs were, and you said that it 11:08:46  
20 related to the sales figures, essentially units 11:08:49  
21 and volume. 11:08:56

22 A. I think I also said duties and 11:08:58  
23 responsibilities of an MLO, responsibility to 11:09:00  
24 the company. 11:09:03

25 Q. And I guess my question is what is 11:09:03

1 the -- what do the units and the volume have to 11:09:06  
2 do with the administrative exemption analysis 11:09:08  
3 that you undertook? 11:09:12

4 A. I think one of the things that 11:09:12  
5 they get to would be the discretion. So for an 11:09:14  
6 MLO to be productive in terms of the 11:09:18  
7 productivity, it gets to how they are having 11:09:19  
8 conversations with a customer. If they are not 11:09:23  
9 productive in those conversations, the customer 11:09:26  
10 can walk and go down to another bank down the 11:09:29  
11 street. So I would say productivity would be 11:09:31  
12 an indication of the LO's competency around the 11:09:34  
13 duties and responsibilities. 11:09:38

14 Q. Was there any discussion during 11:09:40  
15 this mid 2006 audit of whether the loan 11:09:53  
16 officers, the MLO's, had the primary duty of 11:09:59  
17 making sales? 11:10:02

18 A. Clarify your question when you say 11:10:03  
19 making sales. How are you defining that? 11:10:05

20 Q. Well, the sales process that you 11:10:08  
21 had described earlier. 11:10:11

22 MR. HALL: Objection to the form 11:10:14  
23 of the question. 11:10:15

24 THE WITNESS: So repeat the 11:10:16  
25 question again. 11:10:17

1 BY MR. SELANDER:

11:10:18

2 Q. Sure. Was there any discussion  
3 about whether or not loan officers had the  
4 primary duty of making sales?

11:10:18

11:10:19

11:10:23

5 A. No.

11:10:26

6 Q. And at the end, it says that the  
7 determination was made or it was determined  
8 that the positions remained as administratively  
9 exempt under the revised FLSA regulations. Was  
10 that a collective decision, or was it your  
11 decision or someone else's? Can you describe  
12 that?

11:10:27

11:10:42

11:10:46

11:10:49

11:10:53

11:10:56

11:10:59

13 A. A collective decision.

11:11:00

14 Q. And there was no document  
15 memorializing that decision?

11:11:01

11:11:04

16 A. As far as I know, I don't think  
17 there was.

11:11:04

11:11:06

18 Q. Looking at paragraph nine, it  
19 describes your learning of the Mortgage  
20 Banker's Association request to the Department  
21 of Labor for an opinion letter; is that  
22 accurate?

11:11:07

11:11:18

11:11:23

11:11:27

11:11:32

23 A. Yes.

11:11:32

24 Q. How did you learn about that  
25 Mortgage Banker request?

11:11:32

11:11:34

1 looked at the piece in item number eight. 11:12:41

2 Q. So following that same group who 11:12:44  
3 also had knowledge of the Mortgage Banker's 11:12:50  
4 Association letter? 11:12:52

5 A. Yes. 11:12:53

6 Q. Was that something that was 11:12:53  
7 discussed during your audit, as well? 11:12:55

8 A. I don't recall if it was. 11:12:58

9 Q. Looking at paragraph ten, which 11:13:00  
10 continues on to page three, you received a copy 11:13:23  
11 of the opinion letter after it was issued on 11:13:31  
12 September 8th. Do you remember how you 11:13:34  
13 obtained a copy of it? 11:13:35

14 A. I think I received it from our 11:13:36  
15 compensation partners. 11:13:38

16 Q. And it says, continuing on to the 11:13:40  
17 second page, page three, excuse me, at the top, 11:13:48  
18 following my receipt of the September 2006 11:13:55  
19 opinion letter, we also contacted outside 11:13:58  
20 counsel and others in the industry to determine 11:13:59  
21 what others in the financial services -- what 11:14:03  
22 others in financial services were doing with 11:14:06  
23 respect to similar positions. What outside 11:14:08  
24 counsel did you contact? 11:14:12

25 A. I don't remember the name of the 11:14:13

1 Q. Did you understand that the 11:16:04  
2 opinion letter issued on September 8, 2006, by 11:16:24  
3 the DOL was based on an underlying assumption 11:16:29  
4 that less than 50 percent of the loan officer 11:16:33  
5 job duties were related to customer 11:16:37  
6 persuasive -- customer specific persuasive 11:16:42  
7 sales activity? 11:16:46

8 A. Yes. 11:16:46

9 Q. How did you determine that Fifth 11:16:47  
10 Third's loan officers spent less than 11:16:53  
11 50 percent on those activities? 11:16:57

12 A. I go back to the time that I was 11:16:58  
13 able to shadow an MLO, and that gave me good 11:17:00  
14 exposure to what they would do on a typical 11:17:03  
15 day, but also members of our team. I 11:17:06  
16 referenced Joe Treinen previously. We relied 11:17:09  
17 on him as the voice of our customer, so to 11:17:12  
18 speak, to be kind of the voice of the business 11:17:16  
19 and really bring the nature of the duties and 11:17:18  
20 responsibilities of the LO to the table. 11:17:20

21 Q. After reading the September 8, 11:17:32  
22 2006, opinion letter, did you understand that 11:17:52  
23 it was the Department of Labor's position that 11:17:53  
24 a loan officer with the primary duty of sales 11:17:57  
25 should be classified as non-exempt? 11:18:00

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1 A. Yes. 11:18:01

2 Q. And, again, during this time 11:18:01

3 period, there was no -- no effort to speak to 11:18:19

4 or obtain information from the loan officers 11:18:25

5 that Fifth Third employed about their job 11:18:27

6 duties and the time they spent on particular 11:18:30

7 activities? 11:18:33

8 MR. HALL: Objection to the form 11:18:39

9 of the question. 11:18:42

10 THE WITNESS: Yes, that's correct. 11:18:42

11 MR. SELANDER: Let's mark that. 11:18:59

12 (Thereupon, Plaintiffs' Exhibit 6,

13 memorandum to Stephanie Bauer Daniel from

14 Robert C. Varnell dated November 8, 2006, was

15 marked for purposes of identification.)

16 BY MR. SELANDER:

17 Q. The court reporter has handed you 11:19:35

18 Exhibit 6, which is Defendant's Bates labeled 11:19:37

19 262 through 268. Do you have that? 11:19:46

20 A. Yes, I do. 11:19:50

21 Q. And do you recognize this 11:19:51

22 document? 11:19:52

23 A. Yes, I do. 11:19:53

24 Q. And is this the memo that you 11:19:54

25 obtained from Mr. Varnell as the outside 11:19:58

1 counsel?

11:20:02

2 A. Yes.

11:20:03

3 Q. On the last page, there's a carbon  
4 copy to Robert P. Davis and Tamara S. Killion.

11:20:04

5 Do you know who Tamara S. Killion is?

11:20:29

6 A. No.

11:20:35

7 Q. Do you recall ever speaking with  
8 her?

11:20:37

9 A. No.

11:20:38

10 Q. Do you recall ever speaking with  
11 Robert Davis?

11:20:41

12 A. No.

11:20:42

13 Q. Did you ever speak with Rob  
14 Varnell?

11:20:43

15 A. No.

11:20:44

16 Q. In footnote two on page one,  
17 Mr. Varnell says that, quote, our current  
18 understanding of the duties performed by Fifth  
19 Third Bank's mortgage loan officers is based  
20 principally on a review of certain job  
21 descriptions and other materials provided to  
22 us. Do you know what job descriptions and  
23 other materials were provided to Mr. Varnell?

11:20:45

11:20:48

11:20:48

11:20:49

11:21:06

11:21:08

11:21:11

11:21:13

11:21:15

11:21:17

11:21:21

24 A. No.

11:21:24

25 Q. Do you know who would know that?

11:21:25



1 A. No. 11:21:27

2 Q. Do you think Stephanie Bauer 11:21:27

3 Daniel would know? 11:21:31

4 A. Potentially. 11:21:31

5 Q. Did the team -- to your knowledge, 11:21:32

6 did the team that you were working with and 11:21:42

7 that you have described earlier have 11:21:46

8 conversations with Mr. Varnell or Mr. Davis? 11:21:47

9 A. No. 11:21:55

10 Q. Do you not know or they did not 11:21:56

11 have conversations? 11:22:00

12 A. Our team did not have a meeting or 11:22:01

13 conference call with the outside counsel. The 11:22:04

14 first time I saw this letter was when Stephanie 11:22:07

15 had distributed it to us to review. 11:22:10

16 Q. Were you aware that she had 11:22:13

17 contacted outside counsel? 11:22:14

18 A. Yes. 11:22:17

19 Q. Do you know if Mr. Varnell ever 11:22:17

20 spoke to any Fifth Third Bank loan officers? 11:22:51

21 A. I don't know. 11:22:51

22 Q. The letter also references the 11:22:51

23 inside versus outside loan officers. 11:22:51

24 A. Yes. 11:22:55

25 Q. Which loan officers is he 11:22:55

1 Q. Anything else that impacted the 11:42:42  
2 mortgage loan officer position? 11:42:45

3 A. From a process step, I mean, those 11:42:47  
4 course associated process steps you would have 11:42:50  
5 to go through with the TILA. 11:42:52

6 Q. What about the Dodd-Frank Act, how 11:42:58  
7 did that impact the mortgage loan officer 11:43:03  
8 position? 11:43:06

9 A. Probably the biggest impact was 11:43:06  
10 around some of the compensation elements. Also 11:43:08  
11 Dodd-Frank had specific pieces preventing any 11:43:12  
12 type of steering, so steering to certain 11:43:15  
13 products. We could not compensate our LO's 11:43:18  
14 more for certain products. We could not pay on 11:43:21  
15 profitability of the loan. 11:43:26

16 Q. How was Fifth Third paying on 11:43:29  
17 profitability of the loan? 11:43:33

18 A. We had qualifiers for the annual 11:43:34  
19 bonus that had to meet a certain threshold in 11:43:38  
20 terms of profitability. Also our sales 11:43:41  
21 managers had some profitability metrics, like 11:43:48  
22 revenue, for example, that they were 11:43:48  
23 compensated on. 11:43:49

24 Q. So what would make a loan more 11:43:51  
25 profitable or less profitable? 11:43:52

1           A.    A variety of factors.  You know, 11:43:54  
2    one of the things that Dodd-Frank prevents 11:44:03  
3    would be taking an overage or an underage on a 11:44:03  
4    loan.  So from that standpoint, if we have 11:44:05  
5    charged a higher price, or if we have had to 11:44:08  
6    take a lower price, those would all impact 11:44:11  
7    profitability. 11:44:18

8           Q.    Anything else that you can think 11:44:18  
9    of? 11:44:18

10          A.    Cost originate, so what's your 11:44:18  
11   sales infrastructure in terms of people that 11:44:19  
12   you have in place.  That impacts profitability, 11:44:22  
13   as well. 11:44:25

14          Q.    That didn't have anything to do 11:44:26  
15   with Dodd-Frank, though, did it? 11:44:28

16          A.    You couldn't pay on -- you know, 11:44:29  
17   for example, we had some of our ASM plans that 11:44:31  
18   paid on revenue.  We couldn't do that anymore 11:44:35  
19   under Dodd-Frank. 11:44:37

20          Q.    Anything else in terms of 11:44:40  
21   Dodd-Frank that impacted the MLO position? 11:44:44

22          A.    More focus on risk and managing 11:44:47  
23   risk and making sure that the compensation 11:44:52  
24   plans were not driving inappropriate behaviors 11:44:55  
25   from a risk standpoint. 11:44:59

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1           Q.    What would -- can you give me an           11:45:00  
2    example of steering?  How would that -- when           11:45:03  
3    would that occur?  And I'm not suggesting that           11:45:07  
4    it did.  I'm just -- I don't understand the           11:45:09  
5    idea of steering.           11:45:14

6           MR. HALL:  Objection to the form           11:45:15  
7    of the question.           11:45:16

8           THE WITNESS:  An example of           11:45:16  
9    steering would be as an MLO meets with a           11:45:17  
10   customer and whether intentionally or           11:45:20  
11   unintentionally puts them into a product that           11:45:24  
12   isn't the right fit for the customer.  So it           11:45:29  
13   may be they did not disclose it properly, they           11:45:30  
14   may be steering them to a product that provides           11:45:35  
15   more compensation for the LO's pocketbook, but           11:45:38  
16   may not be to the best service of the customer.           11:45:42

17          MR. HALL:  Tim, I'm sorry,           11:46:06  
18    whenever you get --           11:46:07

19          MR. SELANDER:  Let's just take a           11:46:07  
20    break.           11:46:09

21          (Recess taken.)           11:46:12

22          MR. SELANDER:  Let's go back on           12:00:10  
23    the record.           12:00:12

24    BY MR. SELANDER:           12:00:13

25          Q.    Would you agree that Fifth Third           12:00:14

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1 refers to its loan officers as the sales force?

12:00:17

2 A. Yes.

12:00:20

3 Q. And if you could look at the

12:00:21

4 Varnell memo. What exhibit is that?

12:00:30

5 A. 6.

12:00:35

6 Q. 6. Thank you. I just want to

12:00:35

7 clarify that this was issued on November 8,

12:00:42

8 2006, and after that, there was no further

12:00:52

9 review, audit, or discussion of changing the

12:00:54

10 exempt status of loan officers to non-exempt

12:01:02

11 until March 24, 2010?

12:01:07

12 A. That's correct.

12:01:09

13 Q. And there's no other documents

12:01:10

14 other than this relating to the opinion of

12:01:11

15 outside counsel?

12:01:16

16 A. That's correct.

12:01:17

17 Q. And if there were any other

12:01:17

18 documents, you would be aware, right?

12:01:19

19 MR. HALL: Objection to the form

12:01:22

20 of the question.

12:01:23

21 THE WITNESS: Yeah, I'm not sure

12:01:23

22 if I would be.

12:01:24

23 BY MR. SELANDER:

12:01:25

24 Q. There was nothing else circulated

12:01:26

25 amongst the group that was looking at the

12:01:28

1 exempt classification? 12:01:30

2 A. That's correct. 12:01:32

3 Q. And in your paragraph eight of 12:01:33  
4 your declaration, Exhibit 3, in the first 12:01:37  
5 sentence there you say during mid 2006, the 12:01:45  
6 business reviewed the MLO positions, and then 12:01:48  
7 this memo here from Rob Varnell, Exhibit 6, is 12:01:54  
8 dated November of 2006. So is it fair to say 12:01:57  
9 that -- well, based on the date of this 12:02:02  
10 document, the Varnell memo, Exhibit 6, does 12:02:05  
11 that help you clarify when the review and the 12:02:09  
12 audit actually began? 12:02:14

13 MR. HALL: Objection to the form 12:02:16  
14 of the question, mischaracterizes the witness's 12:02:17  
15 testimony. 12:02:20

16 THE WITNESS: We started the 12:02:20  
17 process before the actual letter had come out. 12:02:21  
18 That's the audit that you see in item eight. 12:02:23

19 BY MR. SELANDER: 12:02:25

20 Q. Okay. So is that -- that's what I 12:02:26  
21 mean, does it help you to clarify when it 12:02:28  
22 began? This is what the audit culminated in, 12:02:31  
23 correct, is Exhibit 6, the Varnell memo? 12:02:34

24 MR. HALL: Objection, 12:02:37  
25 mischaracterizes the witness's testimony. 12:02:38

1 THE WITNESS: We have two work 12:02:40  
2 streams. So we were looking at the MLO 12:02:44  
3 positions, then we also -- I mean, you kind of 12:02:46  
4 see a linkage here from a timeline perspective, 12:02:50  
5 but obviously when we received the DOL letter, 12:02:53  
6 you know, we took another look at it to make 12:02:56  
7 sure that we had properly classified our 12:02:59  
8 employees. 12:03:00

9 BY MR. SELANDER: 12:03:02

10 Q. But the audit that you are 12:03:02  
11 describing in paragraph six, which is described 12:03:04  
12 as mid 2006, is occurring or began at some 12:03:08  
13 point before September 8, 2006? 12:03:12

14 A. Yes. 12:03:15

15 Q. Okay. And as far as this audit 12:03:15  
16 process goes, again, I just want to be clear, 12:03:32  
17 you are not in possession of any documents or 12:03:37  
18 e-mails relating to that audit, correct? 12:03:40

19 A. That's correct. 12:03:42

20 Q. And correct me if I'm wrong, but I 12:03:42  
21 believe you earlier testified that the only 12:03:48  
22 thing there might have been that you recall is 12:03:49  
23 maybe a meeting agenda, a handout at a meeting 12:03:53  
24 or something? 12:03:56

25 A. Yes, that's correct. 12:03:56

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1 Q. And in paragraph 11 of your 12:03:57  
2 declaration, the last sentence says we relied 12:04:04  
3 on the September 2006 opinion letter issued by 12:04:09  
4 the DOL and the advice of outside counsel in 12:04:12  
5 determining that it was appropriate for Fifth 12:04:15  
6 Third to maintain the exempt status of the MLO 12:04:17  
7 position. And when you say the advice of 12:04:20  
8 outside counsel, again, you are referring to 12:04:23  
9 Exhibit 6, which is the Rob Varnell memo? 12:04:24

10 A. Yes. 12:04:27

11 Q. And is there anything else that 12:04:27  
12 you are referring to there as far as advice 12:04:29  
13 from outside counsel? 12:04:31

14 A. No. 12:04:32

15 MR. SELANDER: Would you mark 12:05:04  
16 this? 12:05:05

17 (Thereupon, Plaintiffs' Exhibit 7, 12:05:05  
18 Defendant Fifth Third Bank's Statement of 12:05:05  
19 Proposed Undisputed Material Facts, was marked 12:05:05  
20 for purposes of identification.) 12:05:17

21 BY MR. SELANDER: 12:05:17

22 Q. The court reporter has handed you 12:05:17  
23 Exhibit 7, which is Defendant Fifth Third 12:05:18  
24 Bank's statement of proposed undisputed 12:05:24  
25 material facts filed in this lawsuit on 12:05:26



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1 July 18, 2011. And I want to direct your 12:05:31  
2 attention to page seven, paragraph 12. Midway 12:05:40  
3 towards the bottom, the sentence begins as a 12:05:57  
4 result of this audit, Fifth Third created the 12:06:01  
5 MLO position, with its own job duties and 12:06:05  
6 responsibilities, and classified the position 12:06:07  
7 as administratively exempt. 12:06:09

8 I don't understand that sentence 12:06:14  
9 in light of the fact that you were auditing the 12:06:17  
10 position already, and it was already in 12:06:20  
11 existence. Can you explain that? 12:06:22

12 A. It's the first time I'm seeing 12:06:30  
13 this, so I'm not sure what the word created 12:06:30  
14 would be since the position was already in 12:06:37  
15 place. 12:06:40

16 Q. It's possible it's just a typo or 12:06:42  
17 a miscommunication. I just want to know, are 12:06:44  
18 you aware of any creation of a position with 12:06:46  
19 its own job duties and responsibilities after 12:06:51  
20 the audit was completed? 12:06:55

21 A. No, we did not create any 12:06:55  
22 additional positions. 12:06:57

23 Q. And then the next sentence says 12:06:58  
24 during this process, Mr. Wilson became familiar 12:07:04  
25 with the duties and responsibilities of the new 12:07:07

1 MLO position and determined that it was 12:07:14  
2 appropriate to classify the position as 12:07:14  
3 administratively exempt under the revised FLSA 12:07:14  
4 regulations. There was no new MLO position, 12:07:19  
5 right? 12:07:22

6 A. That's correct. 12:07:22

7 Q. That's all the questions I have 12:07:23  
8 about that exhibit. 12:07:38

9 Going back to the declaration, 12:07:51  
10 paragraph 14. In paragraph 14, you discuss the 12:07:53  
11 efforts that Fifth Third made in 2011 to 12:08:06  
12 identify time worked by current MLO's over 12:08:14  
13 40 hours in any week since March 24, 2010. 12:08:19  
14 What went into that process? 12:08:22

15 A. Really working with the managers 12:08:24  
16 to make an assessment of the time actually 12:08:27  
17 worked. 12:08:30

18 Q. So how would -- were managers 12:08:33  
19 given instruction -- 12:08:36

20 A. Yes. 12:08:37

21 Q. -- on how -- how to determine the 12:08:37  
22 number of hours? What instruction was given? 12:08:46

23 A. The instruction was to look at 12:08:46  
24 productivity levels, to look at calendar 12:08:46  
25 appointments, to look at results of any mid 12:08:48

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1 STATE OF OHIO )

2 COUNTY OF MONTGOMERY ) SS: CERTIFICATE

3 I, Karen M. Rudd, a Notary

4 Public within and for the State of Ohio, duly

5 commissioned and qualified,

6 DO HEREBY CERTIFY that the

7 above-named MARK WILSON, was by me first duly

8 sworn to testify the truth, the whole truth and

9 nothing but the truth.

10 Said testimony was reduced to

11 writing by me stenographically in the presence

12 of the witness and thereafter reduced to

13 typewriting.

14 I FURTHER CERTIFY that I am not a

15 relative or Attorney of either party, in any

16 manner interested in the event of this action,

17 nor am I, or the court reporting firm with which

18 I am affiliated, under a contract as defined in

19 Civil Rule 28(D).

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1                   IN WITNESS WHEREOF, I have hereunto set  
2   my hand and seal of office at Dayton, Ohio, on  
3   this \_ \_ \_ \_ day of \_ \_ \_ \_ \_ \_ \_ \_ , 2011.

4

5

\_ \_ \_ \_ \_  
KAREN M. RUDD  
NOTARY PUBLIC, STATE OF OHIO  
My commission expires 5-21-2012

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